

U.S. Department of Labor

Office of Administrative Law Judges
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Mailed 9/28/2000-long beach, ca

IN THE MATTER OF:

Henry S. Tahara
Claimant

against

Kalama Services

Employer

and

ACE, USA
Carrier

and

Director, Office of Workers'
Compensation Programs, United
States Department of Labor
Party-in-Interest

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Case Nos.: 2000-LHC-0182

* OWCP Nos.: 15-40695

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APPEARANCES:

Steven T. Brittain, Esq.
For the Claimant

Eugene L. Chrzanowski, Esq.
For the Employer/Carrier

Norman S. Nayfach, Esq.
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was scheduled to be held on July 10, 2000 in Honolulu, Hawaii. However, the parties waived their right to a formal hearing and advised this Court that they would submit this claim for resolution upon a stipulated record and, to effectuate their agreement, the parties have filed pertinent stipulations (JX 1) and other evidence in support of such stipulations. The matter is now ready for resolution and this decision will be rendered after giving full consideration to this closed record before me.

Stipulations and Issues

The parties stipulate (JX 1), and I find:

1. The Act applies to this proceeding.
2. Claimant (Henry S. Tahara) and the Employer (Kalama Services) were in an employee-employer relationship at the relevant times.
3. On or about August 10, 1998, Claimant suffered an injury to his back in the course and scope of his employment which consists of a 35.90 percent binaural hearing loss.
4. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.
5. The applicable average weekly wage is \$832.00.
6. The Employer and Carrier have paid neither compensation nor medical benefits herein.

The unresolved issues in this proceeding are:

1. The extent of Claimant's current hearing loss.
2. The extent of any pre-employment hearing loss.
3. The applicability of Section 8(f) of the Act.

For the reasons stated herein, this Court finds that the Employer had timely notice of Claimant's hearing loss and that Claimant filed a timely claim for compensation. This Court further finds that Claimant presently suffers from a 35.90 percent binaural hearing loss arising out of an in the course of his employment and that the Employer is not only responsible for the benefits awarded herein, but also is entitled to Section 8(f) relief in mitigation of that obligation.

Summary of the Evidence

Sometime after November 20, 1995 Claimant commenced employment as a power plant operator for Kalama Services (herein "Employer"), a maritime facility subject to the provisions of the Longshore Act as extended. While at the Employer's facility, Claimant was exposed to loud noises every day. (JX 1)

Claimant entered the employ of the Employer on or about November 20, 1995 and he has been administered several audiograms over the years and the results of those hearing tests are reflected in the attachments to the August 22, 1998 report of Dr. Walter K. W. Young. (EX 1)

On behalf of the Claimant, the August 22, 1998 medical report of Dr. Young was introduced. (EX 1) Dr. Young reviewed audiograms performed on Claimant over the years and the doctor opined that these audiograms reflected a hearing loss which was sensorineural in nature and was consistent, in part, with employment-related noise exposure. Dr. Young based this opinion on the Claimant's history report, the physical examination and his review of Claimant's audiograms. (EX 1) According to the doctor, the crucial issue was the identify of the Responsible Employer.

On the basis of the totality of this closed record this Court makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Administrative Law Judge, in arriving at the decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is now bound to accept the opinion or theory of

any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), reh. Denied, 391 U.S. 929 (1968); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.** 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.** 8 BRBS 564 (1978). At the outset if further must be recognized that all factual doubts must be resolved in favor of the Claimant **Wheatley v. Adler**, 407 F.2d 307 (D.C. Cir. 1968); **Strachan Shipping Co. v. Shea**, 406 F.2d 521 (5th Cir. 1969), cert. denied, 395 U.S. 921 (1970). Furthermore, it consistently has been held that the Act must be construed liberally in favor of the Claimant, **Voris v. Eikel**, 346 U.S. 328 (1953); **J.V. Vozzolo, Inc. v. Britton**, 377 F.2d 144 (D.C. Cir. 1967), and, based upon the humanitarian nature of the Act, all doubts are to be resolved in favor of Claimant. **Durrah v. WMATA**, 760 F.2d 320 (D.C. Cir. 1985); **Champion v. S & M Traylor Brothers**, 690 F.2d 285 (D.C. Cir. 1982); **Harrison v. Potomac Electric Power Co.**, 8 BRBS 313 (1978).

I. Notice and Timeliness of Claim

Under the 1984 Amendments to the Act, in hearing loss cases the time for filing a notice of injury under Section 12 and a claim for compensation under Section 13 does not begin to run until the employee has received an audiogram and a report indicating that he has suffered a work-related hearing loss. Section 8(c)(13)(D) as amended by P.L. 98-426, enacted September 28, 1984. **Mauk v. Northwest Marine Iron Works**, 25 BRBS 118 (1991); **Fucci v. General Dynamics Corp.**, 23 BRBS 161 (1990); **Fairley v. Ingalls Shipbuilding**, 22 BRBS 184 (1989), aff'd in part, rev'd in part and remanded sub nom. **Ingalls Shipbuilding v. Director, OWCP**, 898 F.2d 1088 (5th Cir. 1990), Rehearing En Banc denied, 904 F.2d 705 (June 1, 1990); **Machado v. General Dynamics Corp.**, 22 BRBS 176 (1989); **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Macleod v. Bethlehem Steel Corp.**, 20 BRBS 234 (1988). See also **Alabama Dry Dock and Shipbuilding Corporation v. Sowell**, 933 F.2d 1561, 24 BRBS 229 (11th Cir. 1991).

Claimant's hearing acuity was tested by Dr. Young on August 10, 1998 and Claimant learned of his hearing impairment on the date of this examination. He received a copy of the audiogram

and the doctor's report on or about August 22, 1998. (EX 1) The notice and filing periods in this case, thus, began to run on August 22, 1998. As Claimant's claim for benefits was timely filed, clearly the requirements of Sections 12 and 13 have been satisfied by Claimant. **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301 (1980); **Fucci, supra**; **Fairley, supra**; **Machado, supra**; **Grace, supra**; **Macleod, supra**.

II. Nature and Extent of Disability

A. Causal Connection

The Claimant must allege and injury which arose out of and in the course of his employment. **U.S. Industries v. Director, Office of Workers' Compensation Programs**, 455 U.S. 608, 102 S.Ct. 1312 (1982). The term "arose out of" refers to injury causation. (**Id.**) The Claimant must allege that his injury arose in the course of his employment as the Section 20 presumption does not substitute for allegations necessary for Claimant to state a **prima facie** case. (**Id.**)

The medical evidence before this Court clearly establishes that Claimant suffered a hearing loss arising out of and in the course of his work at the Employer's facility. Dr. Young, based upon Claimant's personal history and upon a physical examination, during which an audiogram was administered, opined that claimant suffered from a sensorineural hearing loss in both ears which was consistent, in part, with noise-induced loss and due to employment-related noise exposure. (EX 1)

The well-reasoned and well-documented report of Dr. Young, together with the parties' stipulations and the lack of evidence of non-employment related exposure to noise, demonstrates a causal connection between Claimant's hearing impairment and his work at the Employer's facility. This Court thus finds that Claimant has satisfied the rule in **U.S. Industries, supra**, and that the Employer and its Carrier are responsible for Claimant's work-related hearing loss. See **Fucci v. General Dynamics Corp.**, 23 BRBS 161 (1990); **McShane v. General Dynamics Corp.**, 22 BRBS 427 (1989); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301 (1989).

While the record reflects that Claimant had some degree of hearing loss at the time he was hired by the Employer on or about November 20, 1995 (EX 1), it is well-settled that the

Employer takes its workers "as is," with all the human frailties, and the Employer is responsible for the combination or aggravation of such pre-existing disability with a subsequent work-related injury subject, of course, to the limiting provisions of Section 8(f) in appropriate situations. Moreover, while Claimant's hearing loss is due to both employment-related noise exposure and to non-employment related factors, it is well-settled that the Employer is liable for Claimant's entire binaural hearing loss. **Epps v. Newport News Shipbuilding and Dry Dock Company**, 19 BRBS 1 (1986); **Worthington v. Newport News Shipbuilding and Dry Dock Company**, 18 BRBS 200 (1986). Furthermore, the Board has held that the aggravation rule does not permit a deduction from Employer's liability in hearing loss cases for the effects of presbycusis (i.e., hearing loss due to the aging process). **Ronne v. Jones Oregon Stevedoring Company**, 22 BRBS 344 (1989), **aff'd in pertinent part and rev'd on other grounds sub nom. Port of Portland v. Director, OWCP**, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991).

Thus, the Employer and its Carrier are responsible for all of Claimant's current hearing loss subject, of course, to Section 8(f) relief if the tri-partite requirements are satisfied.

B. Degree of Hearing Loss

The 1984 amendments provide that an audiogram "shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof" if it was administered by a licensed or certified audiologist or a physician certified in otolaryngology, was provided to the employee at the time it was performed, and if no contrary audiogram made at the same time (or within thirty (30) days thereof) is produced. Section 8(c)(13)(C) as amended. **See Manders v. Alabama Dry Dock and Shipbuilding Corp.**, 23 BRBS 19 (1989); **Gulley v. Ingalls Shipbuilding, Inc.**, 22 BRBS 262 (1989), **aff'd in part, rev'd in part and remanded sub nom. Ingalls Shipbuilding v. Director, OWCP**, 898 F.2d 1088 (5th Cir. 1990), **Rehearing En Banc denied**, 904 F.2d 705 (June 1, 1990).

Regarding Claimant's present hearing loss, several audiograms appear in the record. On August 20, 1998 the Claimant's hearing was tested by a certified audiologist at the office of Dr. Young and Claimant received a copy of these

results through his attorney. (EX 1) Thus, the audiogram meets the requirements of Section 8(c)(13)(C) and is deemed presumptive evidence of the extent of Claimant's hearing loss as of August 10, 1998. The results calculated under the JAMA standard are:

August 10, 1998 (EX 1)

	<u>Left Ear</u>	<u>Right Ear</u>
500 Hz	35 dB	35 dB
1000 Hz	35	30
2000 Hz	60	65
3000 Hz	65	70
Monaural	35.60%	37.50%
Binaural	35.90%	

The parties have stipulated and this Court verifies that the JAMA interpretation of this audiogram reveals a 35.90 percent binaural hearing loss.

C. Entitlement

Claimant is entitled to compensation for his hearing loss under the 1984 Amendments to the Longshore and Harbor Workers' Compensation Act. Section 10(i) provides that Claimant's time of injury and average weekly wage shall be determined using the date on which the Claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his employment, his hearing loss and his disability. The date of onset for payment of Claimant's benefits is the date the evidence of record first demonstrates a permanent hearing loss. **Howard v. Ingalls Shipbuilding, Inc.**, 25 BRBS 192 (1992).

For purposes of Section 8(c)(13) and his hearing loss, the

date of Claimant's injury is the date of manifestation. The record reflects that Claimant received a copy of the doctor's August 22, 1998 (EX 1) report on or about that date and that he had filed a protective claim at an earlier time. (JX 1) Thus, the Court finds August 22, 1998 to be the date Claimant learned that his disability was work-related and the date of the manifestation for Section 8 purposes. This Court additionally concludes that Claimant's average weekly wage is \$832.00, as stipulated by the parties and corroborated by the record. (JX 1) **Fucci, supra; Fairley, supra; Grace, supra.**

Accordingly, in view of the foregoing, Claimant is entitled to a scheduled award under Section 8(c)(13). Claimant's binaural hearing loss entitles him to compensation paid at the rate of 66 2/3 percent of his average weekly wage of \$832.00, multiplied by his 35.90 percent binaural hearing loss, commencing on August 22, 1998, the date of manifestation. **Macleod v. Bethlehem Steel Corporation**, 20 BRBS 234, 237 (1988). **See also Fucci, supra.**

III. Medical Benefits

Claimant is entitled to medical benefits under Section 7 of the Act for reasonable, necessary and appropriate expenses related to his loss of hearing. The record establishes that Claimant's hearing test was administered on August 10, 1998 when he saw Dr. Young to have his condition evaluated for purposes of this litigation, the claim having been filed several months earlier. The expenses of these visits for the audiogram and for Dr. Young's evaluation (EX 1), will be paid by the Respondents as a necessary litigation expense under Section 28(d), if these expenses have not already been paid. Claimant is also entitled to reasonable, necessary and appropriate future medical benefits for his hearing impairment, including hearing aids, if necessary, subject to the provisions of Section 7 of the Act.

IV. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously

upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, aff'd in pertinent part and rev'd on other grounds sub nom. **Newport News v. Director**, OWCP, 594 F.2d 986 (4th Cir. 1978); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46, 50 (1989). The Board concluded that inflationary trends in our economy have rendered a fixed six (6) percent rate no longer appropriate to further the purpose of making claimant whole, and held that the fixed six (6) percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills. **Grant v. Portland Stevedoring Co.**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

V. Limitation of Liability

Regarding the Section 8(f) issue, the Employer is entitled to such relief if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the Employer and (3) which combined with the subsequent injury to produce a greater degree of permanent disability. **C & P Telephone v. Director**, OWCP, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The 1984 Amendments to the Longshore Act have now made it possible for an employer to seek contribution from the Special Fund for the employee's pre-employment hearing loss to the extent that such loss existed at the time of hiring, retention or re-hiring by the maritime employer. Ordinarily, the obligation of the Special Fund to pay compensation benefits does

not arise until after one hundred and four (104) weeks of permanent disability have elapsed. However, Congress has now mandated that the Fund is responsible for the employee's pre-employment or pre-existing hearing loss even if the Employer's obligation for benefits is less than one hundred and four (104) weeks. **See** Section 8(f)(1); Conference Report, H.R. 98-1027, 98th Cong. p.L 98-426, pg 8. **See also Strachan Shipping Co. v. Nash**, 51 F.2d 1460 (5th Cir. 1985), **aff'd in pertinent parts on reh. en banc**, 782 F.2d 513 (5th Cir. 1986); **Balzer v. General Dynamics Corp.**, 22 BRBS 447 (1989), **Decision and Order on Motion for Reconsideration En Banc**, 23 BRBS 241 (1990); **McShane v. General Dynamics Corp.**, 22 BRBS 427 (1989); **Risch v. General Dynamics Corp.**, 22 BRBS 251 (1989); **Krotsis v. General Dynamics Corp.**, 22 BRBS 128 (1989), **aff'd sub nom. Director, OWCP v. General Dynamics Corp.**, 90 F.2d 506 (2d Cir. 1990). Under Section 8(f) as amended in 1984, where benefits are awarded under Section 8(c)(13), the employer is liable only for the lesser of one hundred and four (104) weeks or the period attributable to the subsequent injury. **Fucci v. General Dynamics Corp.**, 23 BRBS 161, 164 (1990). Moreover, audiograms taken during the course of employment may be considered if thereafter the employee continues to be exposed to injurious levels of shipyard noise and the employer establishes that the continued exposure aggravated the claimant's hearing loss. (**Id.** at 165)

The Employer and its Carrier ("Respondents") have submitted several audiograms contained in Claimant's physical examination reports performed in the course of his maritime employment. The audiograms were performed on various dates throughout his employment and upon his retention in employment by this Employer. According to Dr. Young, these audiograms were administered to Claimant by certified audiologists. Because these individuals are certified or licensed audiologists, these audiograms are presumptive evidence of Claimant's degree of hearing loss sustained as of those dates, pursuant to Section 8(c)(13)(C). Thus, the results are presumptive evidence and the obtained values are entitled to being accepted by this Court as the tests are reliable and in the absence of contradictory evidence at the same time or within thirty (30) days of such audiogram.

In the case at bar, the Respondents have met this burden and this Court concludes that Claimant's employment audiograms are reliable. In so finding, this Court concludes that these audiological evaluations were taken in the usual course of the

Employer's business. Dr. Young has delineated the procedures used by the Employers to conduct hearing tests on their employees, the personnel who administered these tests, and the doctor has adjusted these values to comply with the ISO, ANSI and JAMA standards.

The 1984 Amendments provide that audiogram results shall be calculated according to the JAMA standard. Section 8(c)(13)(E); **Reggiannini v. General Dynamics Corp.**, 17 BRBS 254 (1985). The JAMA standard uses the values obtained at 500, 1,000, 2,000 and 3,000 hertz. The formulas then applied to determine the degree of hearing loss are as follows:

monaural loss = [(average of results at specified levels) - 25 x 1.5]

binaural loss = [(5 x smaller monaural loss) + larger monaural loss divided by 6]

The results of the Claimant's employment audiogram, while working for Raytheon Services, calculated under the JAMA standard, are as follows:

August 25, 1995 (EX 1)

	<u>Left Ear</u>	<u>Right Ear</u>
500 Hz	30 dB	30 dB
1000 Hz	30	30
2000 Hz	55	60
3000 Hz	60	65
Monaural	28.10%	31.90%
Binaural	28.80%	

Accompanying that audiogram is the August 22, 1998 report of Dr. Young, who has calculated that under JAMA guidelines this audiogram yields a pre-employment binaural hearing loss of 28.80 percent in 1995 (EX 1), and upon Claimant's retention in employment by Raytheon, his prior employer.

In view of the fact that claimant commenced employment at the Raytheon facility in 1993, left on November 19, 1995 and then worked for this Employer in an environment with continued exposure to noise and then was retained in employment by this Employer thereafter, this Court concludes that Claimant's August 25, 1995 (EX 1) audiogram is most representative of Claimant's pre-employment hearing impairment, and that such pre-employment loss is 28.80 percent, binaural.

The Director was given the opportunity by this Court on March 7, 2000 (ALJ EX 1) to file a brief pertaining to the applicability of Section 8(f) and the Director has advised that he does not oppose the Section 8(f) petition if Claimant should establish a work-related hearing loss. As the Employer timely filed a Section 8(f) petition, it is entitled to Section 8(f) relief and there is no bar to this entitlement as the Director does not oppose the petition.

This Court, therefore, finds and concludes that the Employer has established that Claimant (1) worked continuously for the Employer, (2) suffered from a 28.80 percent pre-employment hearing loss which was manifest to the Employer at the time of hiring, (3) now suffers from a 35.90 percent permanent partial disability (hearing loss) that resulted from a combination of his pre-employment permanent partial disability (**i.e.**, his hearing loss as of August 25, 1995) and his August 22, 1998 injury. The Employer, therefore, is entitled to a limitation of liability under Section 8(f) and the Special Fund shall be responsible for Claimant's 28.80 percent pre-employment hearing loss.

Claimant's condition was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain an aggravation of his pre-employment hearing loss. The Employer, in rehiring or retaining Claimant, has effectuated the purpose of Section 8(f) which was enacted to encourage employers to hire and retain handicapped workers. **See** H.R. Rep. No. 1441, 92d Cong. 2d Sess. 8. **Reprinted** in 1972 U.S. Code Cong. & Admin. News 4698, 4705-06; S. Rep. No. 1125, 92d Congress, 2d Sess. 7 (1972). **See also Director, OWCP v. Campbell Industries, Inc.**, 678 F.2d 836, 839, 14 BRBS 974, 976 (9th Cir. 1982), **cert. denied** 459 U.S. 1104 (1983); **C & P Telephone Co. v. Director, OWCP**, 564 F.2d 503, 512, 6 BRBS 399, 412 (D.C. Cir. 1977); **Harris v. Newport News Shipbuilding and Dry Dock Co.**, 23 BRBS 114, 116 (1989). **See**

also **White v. Bath Iron Works Corp.**, 812 F.2d 33, 19 BRBS 70 (CRT)(1st Cir. 1987); **Risch v. General Dynamics Corporation**, 22 BRBS 251 (1989).

This Court, having found Section 8(f) applicable, must now consider the effects of the 1984 Amendments on the Employer's liability. Since this claim was filed after the effective date of the 1984 Amendments, the Employer is liable for the lesser of one hundred and four (104) weeks or the applicable prescribed period of weeks under the schedule for that portion of Claimant's hearing loss attributable to his shipyard employment with this Employer after he was retained in employment after November 20, 1995. **See** Section 8(f)(1) and 8(c)(13); **Risch, supra**.

In view of the foregoing, the Respondents are responsible to the Claimant for his 35.90 percent hearing loss to the extent of 7.10 percent (**i.e.**, $35.90 - 28.80 =$) and shall pay Claimant, Henry S. Tahara, commencing on August 22, 1998, appropriate compensation for his 7.10 percent work-related hearing loss, as the Respondents are responsible only for the increase of Claimant's hearing loss resulting from his shipyard work from November 20, 1995, based on an average weekly wage of \$832.00, as found above. The Special Fund shall pay to Claimant appropriate compensation for his 28.80 percent pre-employment hearing loss, that portion for which the Special Fund is responsible pursuant to the 1984 Amendments to the Act, based on his average weekly wage of \$832.00. **See** Section 8(f)(D).

VI. Responsible Employer

The Employer and its Carrier ("Respondents") are responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d

208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. Sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.** 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to the injurious stimuli, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfied **Cardillo**). Compare **Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

Appropriate benefits for the hearing loss are payable by the employer during the last maritime employment in which the claimant was exposed to the injurious stimuli, **i.e.**, loud and excessive noise, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). The "awareness" component of the **Cardillo** standard is in essence identical to the "awareness" requirement in Sections 12 and 13 of the Act.

The Board has consistently held that the time of awareness for purposes of the last employer rule must logically be the same as awareness for purposes of the provisions of Sections 12 and 13 of the Act. **See, e.g., Grace v. Bath Iron Works Corp.**, 21 BRBS 244, 247 (1988).

As indicated above, in hearing loss cases, the responsible employer is the employer during the last employment in which claimant was exposed to injurious stimuli prior to the date claimant receives an audiogram showing a hearing loss, and has

knowledge of the causal connection between his work and his hearing loss. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205, 208 (1985).

Courts and the Board have consistently followed the **Cardillo** standard because apportionment of liability between several maritime employers is not permitted by the Act. *See, e.g., General Ship Service v. Director, OWCP (Barnes)*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991); **Ricker v. Bath Iron Works Corp.**, 24 BRBS 201 (1991) (the last maritime employer is still responsible for benefits even if the firm is out of business and there may be no insurance coverage under the Act); **Brown v. Bath Iron Works Corp.** 22 BRBS 384 (1989), *aff'd on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), *aff'd*, 113 S.Ct. 692 (1993).

The so-called **Cardillo** rule holds the claimant's last maritime employer liable for all of the compensation due the claimant, even though prior employers of the claimant may have contributed to the claimant's disability. This rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since "all employers will be the last employer a proportionate share of the time." **General Ship Service, supra**, 938 F.2d at 962, 25 BRBS at 25. The purpose of the last employer rule is to avoid the complexities of assigning joint liability and it is apparent that Congress intended that the last employer be completely liable because of the difficulties and delays which would inhere in the administration of the Act if attempts were made to apportion liability among several responsible employers. **Todd Shipyards v. Black**, 717 F.2d 1280, 1285, 16 BRBS 13, 16 (CRT) (9th Cir. 1983), *cert. denied*, 46 U.S. 937 (1984). Moreover, the last employer rule is not a valid defense where a subsequent employer not covered by the Act also contributed to the occupational disease. **Black, supra**, 16 BRBS 15 17 (CRT).

The Board approved the holding of the judge who found as more reliable the 1988 medical evidence because it included an audiogram and the identity of the test administer, a certified audiologist, who opined that the 1988 test was more complete since it reflected all of claimant's hearing impairment. **Dubar v. Bath Iron Works Corp.**, 25 BRBS 5 (1991); **Labbe v. Bath Iron Works Corp.**, 24 BRBS 159 (1991); **Brown v. Bath Iron Works Corp.**,

24 BRBS 89 (1990), **aff'd on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP (Brown)**, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), **aff'd**, 113 S.Ct. 692 (1993).

Raytheon Services, for whom Claimant previously worked, is not responsible for any of the benefits awarded herein as the Employer herein has accepted liability herein. (JX 1)

VII. Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Respondents. Claimant's attorney filed a fee application on June 27, 2000 (CX 1), concerning services rendered and costs incurred in representing Claimant between May 15, 1997 and May 1, 2000. Attorney Steven T. Brittain seeks a fee of \$5,872.18 (including expenses) based on 26.90 hours of attorney time at \$200.00 per hour.

The Respondents have agreed to the requested attorney's fee as reasonable. (JX 1)

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Respondents' acceptance of the requested fee, I find a legal fee of \$5,872.18 (including expenses of \$268.05) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer and Carrier ("Respondents") as a self-insurer shall:

- a) pay Claimant appropriate compensation, commencing on August 22, 1998, for his 7.10 percent work-related binaural hearing loss, based upon his average weekly wage of \$832.00, such compensation to be computed pursuant to Section 8(c)(13)(B).
- b) furnish Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related hearing loss referenced herein may require, including hearing aids if necessary, even after the expiration of the time period specified in Order provision 1(a), subject to the provisions of Section 7 of the Act.

2. The Special Fund shall pay Claimant compensation benefits, based on his average weekly wage of \$832.00, for his 28.80 percent pre-employment hearing loss pursuant to Section 8(f)(1).

3. The Employer and the Special Fund shall pay Claimant interest on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall pay to Claimant's attorney, Steven T. Brittain, a reasonable legal fee of \$5,872.18 (including expenses) for representing Claimant herein before the Office of Administrative Law Judges between May 15, 1997 and May 1, 2000.

5. Raytheon Services is dismissed as a party to this proceeding.

DAVID W. DI NARDI
Administrative Law Judge

Date:
Boston, Massachusetts
DWD:jl